Supreme Court of the United States.

October Term, 1977.

No. 77-1001

ALEX MARKLEY AND ANTONIO SUARES,
PETITIONERS,
v.
UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners Alex Markley and Antonio Suares pray that a Writ of Certiorari be issued to review a judgment and opinion of the United States Court of Appeals for the First Circuit entered on December 16, 1977 affirming the judgment of the United States District Court for the District of Massachusetts dated and entered April 14, 1977, judging the petitioners guilty after conviction and imposing sentence under Title 26 U.S.C. §§ 5861(d) and 5861(e) and Title 18 U.S.C. § 2.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered on December 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rules 15(3), 23(2) and 23(5) of the Revised Rules of this Court.

Questions Presented.

1. Whether Title 26 U.S.C. § 5845(f), defining "destructive devices," is limited to military ordnance or gangster type weapons or similar devices, as held by the Court of Appeals for the Second Circuit in *United States v. Posnjak*, 457 F. 2d 1110 (2d Cir. 1972) or applies to home-made devices, which are not found to be military ordnance or gangster type weapons or similar thereto, as held by the Court below.

2. Whether Title 26 U.S.C. § 5845(f), in accordance with its legislative history, limits the definition of destructive devices to highly destructive or *per se or* highly dangerous devices or whether, in accordance with the decision of the Court below, there is no such legislative history and the statute applies to home-made devices which, when tested by themselves in the open, do no destruction and only minimal damage.

3. Whether the Court below erred in sustaining the defendants' conviction on the basis of evidence of intended use and application of the devices involved, while at the same time approving a construction of Title 26 U.S.C. § 5845(f) that the jury was not to consider the intent of the defendants as to the intended usage of these devices, thus rendering an inherently contradictory decision, which conflicts with decisions of the Courts of Appeals for the Second Circuit on the one hand, *United States v. Posnjak*, 457 F. 2d

1110, 1117 (2d Cir. 1972), and the decision of the Court of Appeals for the Ninth Circuit, on the other hand, *United States v. Oba*, 448 F. 2d 892, 894 (9th Cir. 1971) (majority opinion).

4. Whether Title 26 U.S.C. § 5845, as applied, was void for vagueness in violation of the Fifth Amendment to the Constitution of the United States, and whether the Court below erred in upholding the application of the statute, without a limiting constitutionally definite construction, to the defendants' possession and transfer of a home-made device which in and of itself does not destroy and does minimal damage, thereby denying defendants due process of law.

Statutes Involved.

The relevant constitutional provisions, statutes and legislative reports involved are set forth in Appendix B hereto.

Statement of the Case.

Defendants were indicted in a single indictment charging them (in Count 1) with a conspiracy to maliciously attempt to damage and destroy, by means of an explosive, vehicles used in interstate commerce. This count was dismissed at the close of the Government's case. They were found guilty on the remaining counts which charged defendant Markley with one count of possessing (Count 2) and four counts (Counts 3, 5, 7, 9) of transferring and defendant Suares with three counts of possession (Counts 4, 5 and 6) and three counts of transferring (Counts 7, 8 and 9) an unregistered destructive device, as defined in Title 26 U.S.C. § 5845(f) and prohibited by Title 26 U.S.C. §§ 5812, 5861(d) and 5861(e).

Defendants stipulated that they possessed and transferred the devices as charged (R. 620) but filed a joint pre-trial motion to dismiss on the ground that the devices were not explosive bombs or destructive devices, within the meaning of the statute (R. 30) and motions for judgment of acquittal (R. 593, 640, 642, 646) based, *inter alia*, on the insufficiency of the evidence, the claim that the statute was void for vagueness, and the failure to instruct the jury as to the destructive capability required of the devices and the proper definitions of the terms involved. These motions were denied (R. 84, 666).

The questions presented to the jury were "Were the devices that were possessed and transferred on the dates in question destructive devices, as defined by United States law? Were they in fact explosive bombs or were they similar to explosive bombs?" (R. 620).

The evidence as to these questions is a series of tests of one of the devices and of exemplars of the other three devices, conducted by the Government's expert, Ralph Cooper, Explosives Enforcement Officer of the Bureau of Alcohol, Tobacco and Firearms, further tests conducted by the defendants' expert, Professor Howard Emmons of Harvard University, and the testimony of the two experts. As the Court of Appeals noted in its decision, the facts concerning these tests are undisputed.

The four devices, substantially the same, consist of toilet paper cardboard tubes, approximately 4.5 inches in length, 1.5 inches in diameter, containing between 3.5 and 4.5 ounces of commercially manufactured black powder with a small amount of toilet tissue as a filler, followed by cardboard discs. The ends of the tubes were sealed with paraffin wax. In one end was affixed a fuse. The first device was untaped; the other three were wrapped with black friction tape over their length. Black powder deflagrates — burns relatively

slowly at the rate of one to 100 feet per second — as distinguished from detonating powder, which burns at the rate of 10,000 feet per second (R. 354-356).

The first test conducted by the Government was of an actual device ignited on the surface of the ground next to a wooden stick at Fort Devens, Massachusetts on November 10, 1976. This was filmed. It is undisputed that there was a fireball, estimated at eleven cubic feet in volume for a brief flash but no damage to the ground, the stick or the cardboard container, except that two pieces of toilet tissue as filler were singed or charred. The undamaged tube and the singed tissue are in evidence (Exs. 2, 5 and 15; R. 331-332, 325, 499).

The next series of Government tests was devised and conducted by Mr. Cooper at Fort Belvoir on November 5, 1976: one of an untaped exemplar, the second a taped exemplar, both on the ground against a nine foot wooden stick. The tests did no damage to the stick or ground, dislodged no dirt, but blew out the paraffin plugs, burned or charred each side of the untaped exemplar but did not blow it up and did not damage the taped cardboard tube of the other device.

The next three Government tests were devised to show the intended use and application of the devices against vehicles, particularly trucks (R. 548, 549, 551, 49, 51). The first of these tests ignited an exemplar in the front seat of a Ford pickup truck, with windows and doors closed and blew out the windshield with sufficient force to propel it to about six to eight feet in front of the truck where it fell and broke. In its decision, the Court states the device seared the front seat of the cab (Appendix A, p. 4). There is nothing in the record to support this assertion and the Government does not contend that the device is an incendiary or similar to an incendiary bomb (R. 505). The only damage to the

inside of the cab was a residue of gray ash on the seat and a slight residue on the windows (R. 476, 479, 561-562). The windows were not shattered or damaged (R. 561-562); the seat was not damaged or burned (R. 476, 479); nothing inside the confined cab showed a trace of charring (R. 493). The taped cardboard tube with a paraffin plug in one end was undamaged and on the seat in the same position as before the ignition (Ex. Q, Exs. C, D, E, O, P).

The next test was the ignition of an untaped exemplar under the hood of the same Ford pickup truck. The hood did not move, no damage was done to the truck, the hood, the engine, the distributor or the wires. As the Court below observed, it produced a fireball but did no discernible damage (Appendix A, p. 4; R. 477, 479, 480).

The last Government test ignited an exemplar inside the filler pipe attached to the gas tank of the Ford truck. The ignition created a flame, rupturing the filler pipe and bulging the gas tank. The Court states that Cooper gave it as his opinion that if there had been a gas-air mixture in the tank, it would have created a vapor explosion which would have ruptured the gas tank (Appendix A, p. 4). Cooper's testimony, however, is not so hypothetical. He testified that, in fact, the flame was ignited "because of the gasoline vapor in that vehicle and caused a vapor explosion" (R. 462, 463). The Government's own evidence indicates that it was the gasoline vapor in the vehicle and the vapor explosion in the confined filler pipe gasoline tank area which caused the damage to the pipe and tank.

Professor Emmons for defendants conducted four tests of exemplars furnished by the Government, with pressure, temperature and various electronic measuring and recording devices. The first test, set in the surface of a roadway in the open, in front of an upright stick, showed a short bright flame, some smoke, did no damage to the stick, the

ground or the cardboard container, and did not move the pressure transducers, eight inches from the ignited exemplar. The recording devices showed a pressure of three pounds per square inch which lasted for a quarter of a second, at a temperature of 700° for seven-tenths of a second (R. 349, 404).

The second test was that of an exemplar against a metal ash can adjacent to the stick. The cover of the can popped off, but neither the stick, the ash can nor the ground was damaged (R. 349, 350).

The third test was that of an exemplar against a rusty gallon gasoline can, with a cup of gasoline in it. The test knocked the can over, but did not ignite the gasoline nor did it explode. The pressure transducers, eight inches from the exemplar, were not moved and there was no damage (R. 351, 381).

The fourth test was that of an exemplar inside the trash can where the cover on top confined the exemplar inside the can. The cover was blown in the air some 25 to 30 feet. Neither the can, the cover, the stick nor the ground was damaged (R. 352-353, see Appendix A, p. 3).

A fifth test was made, not of a device or of an exemplar but of a 2.5 ounce salute containing detonating powder, as an illustration of an explosion. This went off with a loud bang, destroyed the trash can, the measuring stick, scattered the remains of the barrel thirty or more yards and dug a hole in the ground (R. 357, Exs. K, L, M; R. 361, Def.'s Ex. N).

Mr. Cooper's testimony was that these devices were not similar to explosive bombs; they were explosive bombs (R. 504-505), destructive devices (R. 465); a complete pyrotechnic delay explosive firing train designed and constructed as weapons capable of producing damage to vehicles (R. 499-501) or an explosive device caused to

function under conditions which will cause property damage, death or injury, by intent or design (R. 520-548). He testified that the only specific requirement is design construction or intended use and application and that the intended use and application was against vehicles (R. 548-549, 551, 51); and that the intended use for an unlawful purpose would turn a lawful device into a destructive device (R. 552-558); there is no requirement for any degree of damage or injury resulting from the use of these devices and that it would be a destructive device if it generated enough pressure to knock over a house of cards adjacent to it (R. 528); and that he was unable to rate the destructive capacity of these devices in and of themselves with their explosive effects on a scale of zero potential for destruction to a dangerous bomb destruction potential (R. 561). He testified that there is no requirement as to how explosive an explosive filler must be or as to any minimum amount of explosive and that in reaching his conclusion and conducting his tests he never used instrumentation to measure, calculate or record blast or pressure waves, velocity or temperature (R. 434, 511, 512); that in classifying devices as destructive, his determination was based on common sense, based on reason, based on something that the reasonable average individual in his daily life would accept as fact; that there is no definition of "explosive bomb" in the statute or in the Code of Federal Regulations, but that it is a consensus of opinions, not recorded anywhere, except in his head, and he was unable to supply a reference, military, governmental or professional, which defines an explosive bomb (R. 579-580).

The Court below refers in an incomplete and misleading fashion to Professor Emmons' conclusions (Appendix A, p. 3). These appear in his affidavit (R. 39) of March 3, 1977 (R. 32) in support of the defendants' pre-trial motion

to dismiss. An accurate statement of the cited contents of his affidavit is that if the device was fired against the outside of a car, house or window, it would do no damage to the car or window, but might scorch the paint of the house but would not burn it; that if an explosive bomb is a device which produces a blast wave sufficient to damage a weak structure, such as a tin can, the device is not an explosive bomb, nor a fragmentation or incendiary bomb or, in any of these senses, a bomb at all. It does not produce a violent explosion or bursting, does not produce an explosion; it is not a highly destructive device (R. 39-40). Professor Emmons' testimony at the trial on the basis of measurements and tests, was that the device did not produce a blast wave, it was not an explosive bomb, that it merely burned inside the cab of the truck, it did not explode (R. 372), that the confinement of the cab raised the pressure which burst the windshield out; that it was not capable of blowing up a truck (R. 379-380), that it was not similar to an explosive bomb nor a destructive device, certainly not a highly destructive device (R. 376-379); that although it could endanger a person if pointed at him, it would not injure him or burn or lacerate a hand, if ignited and held at arm's length, parallel to the body (R. 379-380); that as between relatively harmless and destructive devices, these are relatively harmless; and they are neither explosive bombs nor anything similar or destructive devices (R. 381).

The District Court charged the jury that in determining whether the items in question are destructive devices, it may not consider the possible intent or purposes of either defendant or whoever made the devices and unless it finds beyond a reasonable doubt that the devices in question are explosive bombs, in and of themselves, it must find each defendant not guilty (R. 621-623). The District Court refused, however, to charge that to be a destructive device,

the items must be highly destructive and dangerous bombs with great destructive capacity to people or property. Defendants duly excepted. The Court failed to give an instruction defining "bomb" but did give an instruction which equated "explosive" with "explosive bomb," to which defendants excepted. The Court below sustained the District Court with respect to these instructions.

Reasons for Granting the Writ.

I. THE DECISION OF THE COURT BELOW IN THIS CASE CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN *United States v. Posnjak*, 457 F. 2d 1110 (2d CIR. 1972), AS TO THE PROPER INTERPRETATION OF 26 U.S.C. § 5845(f).

In its opinion dated December 16, 1977, the Court below referred to the decision of the Second Circuit in *Posnjak* as holding that

> . . . Section 5845(f)(1) applied to only military ordnance or gangster type weapons, observing that Congress was concerned in the National Firearms Act with weapons which were the cause '. . . of increasing violent crime and which had no lawful uses and the intent of the user of these weapons was irrelevant as they were so prone to abuse that they were considered per se dangerous and unnecessary for legitimate pursuits.' (Appendix A, p. 6).

The decision below states that "This Court in *United States v. Curtis*, 520 F. 2d 1300 (1975), adopted a broader interpretation of the statute than that of the Court in *Posnjak, supra*. . . ." (Appendix A, p. 7), and proceeded to apply that broader standard in concluding

> . . . that there was sufficient evidence to support a jury finding that the home-made devices in this case are

> destructive devices having no legitimate social purpose and fall within the provision of Section 5845(f) regardless of their intended purpose (Appendix A, p. 8).

There is no finding that these home-made devices here involved were military ordnance or ganster type weapons or similar to such weapons. The Court rejected the argument that the legislative history of the Act imposed any requirement that the destructive devices need be highly dangerous or highly destructive (Appendix A, p. 6), and the Court made no finding that any of the tests showed the devices to be highly destructive or highly or *per se* dangerous.

Under these circumstances, there would appear to be a conflict in law between the decision in this case and the decision of the Court of Appeals for the Second Circuit in the *Posnjak* case.

Even if the conflict between the decision of the Court below and the decision of the Second Circuit in *Posnjak* is one of principle, rather than law, the conflict is one in which the need for uniformity of decisions among the Federal Courts of Appeals may well require resolution by the Supreme Court. Thus, the Court below, in *United States v. Curtis, supra*, referred to the "confusing welter of cases construing section 5845(f)" (520 F. 2d at 1302-1303) and cited *United States v. Oba*, 448 F. 2d 892 (9th Cir. 1971) where Browning, J. dissented on the ground that

> . . . the [destructive] devices listed in [the] statutory definition of 'destructive devices' [in § 5845(f)] are specific, objectively identifiable, highly destructive items of military ordnance having no proper use in private hands (448 F. 2d at 899)

and are limited to specifically described military ordnance and gangster type weapons (448 F. 2d at 897 & n.4 at 898).

The purpose of Congress in the Omnibus Crime Control and Safe Streets Act (Pub. L. 90-351) in the Gun Control Act of 1968 (Pub. L. 90-618) and in the amendments to the National Firearms Act and the Internal Revenue Code Title 18 U.S.C. § 921 et seq., Title 26 U.S.C. § 5801 et seq. was to increase the effectiveness, fairness and coordination of criminal justice systems at all levels of government, and to provide federal controls over commerce in firearms and to make it feasible for the states to control more effectively the firearms traffic within their own borders under their own police power (see Appendix B, pp. 16, 18). The increasing number of crimes involving destructive devices — an increase of 13.4 per cent in 1976 in explosive incidents over such incidents reported in 1975 (Department of Treasury, Bureau of Alcohol, Tobacco and Firearms News Release "1977 Explosives Statistics Set Year End Record" December 24, 1977) and an increase in 1974 over 1973 (Sourcebook of Criminal Justice Statistics, 1976, U.S. Department of Justice, Law Enforcement Assistance Administration, Table 3.115, p. 512) indicates the importance of the issue, particularly in the division of responsibilities between the Federal government, and the type of destructive devices it is authorized to regulate, and the responsibilities of the states, which, like Massachusetts, have legislation controlling explosive devices (see, Mass. G.L. c. 148, §§ 39, 45).

II. The Decision of the Court Below, Based on an Erroneous Interpretation of the Legislative History of Title 26, § 5845(f), Raises Significant Problems as to the Statutory Definition of "Destructive Device."

The Court below held that although the legislative history of Public Law 90-351 (The Omnibus Crime Control and Safe Streets Act) amending the provisions as to firearms, Title 18 U.S.C. § 921, et seq., refers to highly destructive devices, Public Law 90-618 (The Gun Control Act) further amending Title 18 U.S.C. § 921, et seq. and revising the National Firearms Act, 26 U.S.C. § 5801, et seq., does not refer to destructive devices as highly dangerous or destructive in its legislative history. The Court stated that the House Bill was passed in lieu of the Senate Bill and neither "highly" nor any other modifications of "destructive device" is used in legislation defining destructive device in either § 5845(f) of Title 26 or § 921(a)(4) of Title 18 (Appendix A, pp. 5-6). The Court, therefore, upheld the District Court's denial of the defendants' Motion to Dismiss and its refusal to charge the jury as requested that the devices must be highly destructive devices.

With deference, we submit that the Court below has misapprehended the legislative history of Title 26 § 5845(f). Volume 3, U.S. Code Cong. and Adm. News, 90th Congress, 2nd Sess., 4412-4435 is the only reference in the Court's decision to the legislative history of Public Law 90-618, amending both Title 18 and Title 26. The legislative history in that volume entirely omits Senate Report No. 1501 and the Court's decision makes no reference to it. A copy of the pertinent parts of that report appears in Appendix B, pp. 18 et seq.

A review of the legislative history of Public Law 90-618 clearly indicates that the Gun Control Act of 1968, although it may have carried the number of the House Bill, was a substitute for both the House Bill and the Senate Amendments (Vol. 3 Cong. & Adm. News, p. 4426) (Appendix B, p. 22), that the amendments which became both Title 18 U.S.C. § 921 and Title 26 U.S.C. § 5845(f) were not contained as such in the House Bill, but were Senate amendments adopted by the conference substitute

(*id.* pp. 4434, 4435, Appendix B, p. 24) and that Senate Report No. 1501, explaining the Senate amendments, stated that a revised definition of destructive devices was included in Title I of the Senate Bill which incorporated technical changes and made consistent the definition of the term in both Title I of the Bill (amending Title 18 of the Code) and Title II of the Bill (amending Title 26 of the Code) (Senate Report No. 1501, Appendix B, pp. 21-23).

The Senate Report explained the revised definition as follows:

> *Highly Destructive Weapons.* The title would extend the coverage of Federal law specifically to include highly destructive devices, such as explosive or incendiary bombs, grenades, mines, etc., and would establish strict controls for interstate and foreign commerce in such devices and large-caliber military-type weapons, such as bazookas, mortars, and antitank guns. The record reflects a consensus that these highly destructive devices should be subjected to strict Federal regulations (Senate Report No. 1501, p. 25, Appendix B, p. 21).

The Court will note that this is the same language with respect to destructive devices as in the legislative history of Public Law 90-351 (Vol. 2 U.S. Code, Cong. & Adm. News, 90th Cong. 2nd Sess., 1968, pp. 2112, 2167-2168, Appendix B, p. 17) that it was the intent of the Senate to make its definition of destructive device in Title I of the Bill consistent with the definition in Title II of the Bill and that it was the Senate amendments with the gloss of the Senate Report which were adopted in the final enactment.

Thus, the legislative history of Title 26 U.S.C. § 5845 (f), Public Law 90-618, refers as fully to highly destructive devices as the legislative history of Title 18 U.S.C. § 921, Public Law 90-351.

The legislative history of Title 26 U.S.C. § 5845 thus warrants the interpretation which requires destructive devices to be highly destructive to be included in the ambit of Federal as distinguished from state law. Such an interpretation of the terms "destructive device" and "explosive bomb" in § 5845(f) by this Court would lead to greater clarity in the "confusing welter of cases involving § 5845(f)," as well as to a different result in the case at bar.

III. The Decision of the Court Below with Respect to Evidence of Intended Use Creates Problems of Statutory Interpretation Which Requires Resolution by this Court.

This decision of the Court below upholds the decision of the District Court in instructing the jury that they were not to consider the intent of defendants as to the intended use of the devices involved, in determining the issue of whether they were dangerous within the terms of the statute (Appendix A, p. 11). The District Court specifically instructed the jury that "unless you find beyond a reasonable doubt that the devices in question are explosive bombs in and of themselves you must find each defendant not guilty" (R. 622).

The only evidence cited in the Court's decision as to the destructive effect of the devices in and of themselves was a test by the Government expert of an exemplar in the open. As to this, the decision states that it resulted in minimal damage. The Court also refers to a test which resulted in a fireball of eleven cubic feet. The evidence as to this test indicates that it resulted in no damage to

anything, except for the charring of two small pieces of toilet tissue in the devices and that the pressure which it generated was three pounds per square inch for a quarter of a second (R. 349, see R. 404), far less than the pressure in an automobile tire or in a tire blowout. Neither side claimed that the device was an incendiary bomb (R. 504, 505); there was testimony that the device would have had to burn 100 times more slowly to become incendiary (R. 405-406) and all the tests of the device or the exemplars by themselves showed minimal damage to anything, except where other factors relating to the intended use of the device were involved.

The Court below cites a test in which the top of a trash barrel was caused to fly 25 to 30 feet in the air, although the barrel and the top were not damaged. The record shows that nothing else — neither the stick nor the ground — was damaged and that the pressure applied to the cover, even with the confinement of the exemplar in the trash can, was roughly equal to the pressure in an automobile tire (R. 352-353).

The Court cites the blowing out of the windshield by the ignition of an exemplar in the front seat of a Ford pickup truck with the doors and windows closed which caused the windshield to be propelled six to eight feet in front of the truck where it fell to the ground and broke. This is not a test of the device in and of itself. It is, instead, evidence of the intended use of the devices bearing with it the additional element of confinement which is critical for generating pressure (R. 405-406). The Government's expert testified that the only specific criterion for his determination was that of intended use; and the record shows that he devised the test of the exemplar in the cab of the truck for that purpose (R. 49,

51, 548-549, 551). Where that element of confinement was not present, as in the test of the exemplar ignited on the engine block, under the hood of the truck, there was no discernible damage, as the Court points out (Appendix A, p. 4; R. 477, 479-480). Similarly, the test of the exemplar in the filler of the gas tank which the Court cites was evidence both of intended use and, in addition, involved gasoline vapor in the test gas tank, and a vapor explosion, rather than a test of the device in and of itself.

In sum, the decision of this Court cites evidence of intended use to justify the verdict of a jury which was required, under instructions from the Court, to disregard evidence of intended use. Such a result creates additional confusion in the interpretation of § 5845(f) and requires resolution.

Posnjak teaches that the National Firearms Act, 26 U.S.C. § 5801 et seq., and the Gun Control Act of 1968, 18 U.S.C. § 921 et seq. are highly technical enactments drafted in technical language and must be construed technically (457 F. 2d, 1111 at 1118); that the standard is an objective one, not dependent on the "intent" or schemes of the possessor (*Id.* at 1118). The jury here was properly instructed to this effect. The majority decision in *United States v. Oba,* 448 F. 2d 892, 894 (9th Cir. 1971), however, held that a device may be converted into a destructive device as defined in subparagraphs (1) and (2) of § 5845(f) by way of design or intent. *See United States v. Peterson,* 475 F. 2d 806, 811 (9th Cir. 1973) ("evil intent").

The decision of the Court below looks both ways, is inherently contradictory, and is necessarily in conflict with these decisions.

IV. The Decision of the Court Below Raises a Substantial Question as to Whether the Statute as Applied to the Devices Here Is Unconstitutionally Void for Vagueness.

The decision of the Court below cites decisions of Courts of Appeals involving such highly destructive items as dynamite, sticks of black powder pellet explosive with blasting caps and Molotov cocktails, as upholding the statute against a claim that it was void for vagueness (Appendix A, pp. 7-8, 10). Even assuming that the *Posnjak* criteria are relaxed, these cited items are similar to grenades or other types of military ordnance. The devices here in and of themselves do minimal damage, are not highly destructive and not similar to military ordnance, or gangster type weapons.

The issue, then, is how destructive a device must be in order to be an explosive bomb or a destructive device. If a device is relatively harmless and does minimal or no discernible damage, in and of itself (*see, United States v. One 1972 Chevrolet,* 369 F. Supp. 755 (D. Neb. 1973)), a statute so broadly drawn as to include such a device as a destructive device or an explosive bomb would appear to run afoul of the constitutional requirement of definiteness, in failing to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. And the Court is under a duty, where possible, to give the statute a reasonably ~~definite~~ construction to make constitutionally definite the class of offenses at which the statute is directed. *United States v. Harriss,* 347 U.S. 612, 617-618 (1954). Here, the Court below has failed to give it any such construction. The Government's expert testified repeatedly that in his determination of the issue there was no requirement

for any degree of damage; any amount would do; it would be sufficient to classify a device as destructive, if it generated enough pressure to blow over a house of cards. As to these devices, he testified that he was unable to rate their destructive capacity on a scale from relatively harmless to highly destructive. He was unable to furnish a definition of an explosive bomb from any documented source; he relied on design construction or intended use and application as the only specific requirement for his determination and concluded that the intended use and application could convert a non-destructive device into a destructive device.

The District Court in charging the jury failed to give the jury any instruction as to the definition of "bomb," an essential element of the crime, and equated "explosive" with "explosive bomb" over the exception of defendants. It refused to charge that to be considered a destructive device, the items must be highly destructive devices and dangerous bombs and gave no instruction as to the degree of damage required. It did, however, charge the jury to disregard the possible intent and purpose of the defendants.

Under these circumstances, the jury presumably disregarded all the evidence of intended use and application. But lacking any instructions as to the degree of damage or destructive capacity required, except that on the Government's testimony that any amount would do, and lacking any definition of "bomb" or "destructive device" or any clear definition of an "explosive bomb," either in the Government's proof or the Court's instructions, the jury was left without constitutionally definite standards in determining whether the devices involved were destructive devices or explosive bombs. The Court below, in its review of the challenge to the lack of standards in the stat-

ute, failed to give the statute any more constitutionally definite construction than did the District Court.

We submit that, absent such construction, the statute as applied is void for vagueness.

Conclusion.

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 77-1209

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE,
v.
ALEX MARKLEY,
DEFENDANT, APPELLANT.

No. 77-1210

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE,
v.
ANTONIO SUARES,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HONORABLE FRANK H. FREEDMAN, *U.S. District Judge*]

Before
COFFIN, *Chief Judge*
CAMPBELL, *Circuit Judge*
CRABY, *District Judge**

Allen R. Rosenberg, with whom *Robert M. Schwartz* and *Putnam, Bell and Russell* were on brief, for appellants.

James E. O'Neil, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

December 16, 1977

* Of the Central District of California, sitting by designation.

CRARY, *District Judge*. This consolidated appeal is from convictions on Counts 2 to 9, inclusive, of the Indictment charging appellant Markley with one count (Count 2) of possessing an unregistered destructive device in violation of Title 26, U.S.C. § 5861(d), and four counts of transferring an unregistered destructive device in violation of Title 26, U.S.C. §§ 5812, 5861(d), 5861(e), and Title 18, U.S.C. § 2.

Appellant Suares was found guilty of three counts of possessing an unregistered destructive device and three counts of transferring an unregistered destructive device.

Count 1, which charged conspiracy of the defendants to maliciously attempt to damage and destroy vehicles used in interstate commerce by means of an explosive, was dismissed following trial.

Motion for judgment of acquittal and to dismiss for insufficiency of the evidence was denied. In addition to asserting insufficiency of the evidence, appellants contend that the statute (26 U.S.C. § 5845(f)(1)) is unconstitutionally vague and that the trial court erred in that (1) it did not instruct the jury that a destructive device must be highly destructive and dangerous, (2) it failed to instruct as to a definition of "bomb" and gave instructions which equated "explosive" with "explosive bomb", (3) it failed to instruct that a destructive device must have the capability to cause destruction, and (4) it failed to give an instruction properly defining "explosion" and "explosive."

The appellants have stipulated that they possessed and transferred the devices as charged.

The four devices involved, one delivered November 7th and three on December 8th, 1975, and the exemplars constructed by the Government for testing purposes, were cardboard tubes approximately 4.5 inches in length, 1.5 inches in diameter, containing 3.5 to 4.5 ounces of commercially manufactured black powder with a small amount of toilet

tissue as a filler, followed by cardboard discs. The ends of the tubes were sealed with pariffin wax. In one end was affixed a fuse.

The first device, received by the Government's undercover agent, O'Reilly, from appellant Markley on November 7, 1975, was tested at Fort Devens on November 10, 1975. The three devices delivered to O'Reilly by Suares on December 8, 1975, were dismantled by the Government on December 10, 1975. Each of these three devices, when received, were wrapped with black friction tape covering their entire length. The exemplars of these three devices, as constructed by the Government, were tested.

Eleven tests in all were made involving the first device delivered and the exemplars, which were made for testing purposes.

Professor Emmons, appellants' expert, conducted tests on February 10, 1977, and viewed the moving pictures of the tests made by the Government previous thereto and concluded that if such devices were fired in the open against the outside of a car or house it would only scorch the paint and that such devices would not produce a violent explosion or bursting and that they were not highly destructive devices. In one of Professor Emmons' tests conducted in the open, ignition resulted in a fire ball of eleven cubic feet. Another firing caused the top of a trash barrel to fly 25 to 30 feet in the air although the barrel and top were not damaged.

The tests conducted by the Government expert, Ralph Cooper, Explosive Enforcement Officer from the Bureau of Alcohol, Tobacco and Firearms, in November, 1976, varied in their destructive aspects. Firing of an exemplar in the open resulted in minimal damage. Cooper testified that "the blast pressure wave" caused by the ignition of an exemplar in the front seat of the cab of a Ford pickup truck with windows and doors closed, blew out the windshield

with sufficient force to propel it about six to eight feet in front of the truck where it fell to the ground and broke. This test resulted in a report, fire ball engulfing the cab and a searing of the front seat where the device had been placed. One of the exemplars was placed under the hood of the Ford pickup on the engine block where it produced a fire ball but did not do any discernible damage.

In another test by Cooper, an exemplar was ignited inside the filler pipe attached to an empty gas tank. The filler pipe burst and the gas tank was bulged by the explosion. Cooper gave it as his opinion that if there had been a gas-air mixture in the tank it would have created a vapor explosion which would have ruptured the gas tank.

Mr. Cooper testified that in his opinion the subject devices were explosive bombs, that they contained an explosive black powder, had a delay explosive firing train (fuse) and were designed and constructed as weapons capable of producing damage to vehicles. He also said that the black powder was "an explosive and it's designed to be exploded."

Neither the appellants nor the Government disputed the facts as to each other's tests.

The Government undercover agent, O'Reilly, testified that on or about November 7, 1975, a Union organizer, appellant Markley, told him of a strike in progress at the Worthington plant in Holyoke, Massachusetts, and asked him to take care of a couple of trucks belonging to Martin Brothers Trucking Company, which had been giving the Union trouble. Markley gave O'Reilly a bomb to test, and after the test was made at Fort Devens O'Reilly told Markley that the device would not do.

Several times after the strike was over O'Reilly met with Markley and discussed other devices. On November 28, 1975, O'Reilly met both appellants and drove with them for several hours stopping at bars and package stores and

during that time discussed the strike, and Markley said he still had in mind blowing up two of Martin Brothers trucks. O'Reilly offered to do that for $300 but nothing further developed on that subject. O'Reilly was wearing a body recorder and the conversations were recorded.

On December 5, 1975, O'Reilly telephoned Markley stating he had a job out Markley's way and needed three of the type of devices Markley had given him before, each to be double taped with different length fuses. He told Markley he was willing to pay $25 a piece. The three devices, assembled and intact, were delivered to O'Reilly by appellant Suares on December 8, 1975, on payment of $75.

The parties agreed that the crucial question of fact for the jury's determination was whether the devices involved were destructive devices within the meaning of 26 U.S.C. § 5845(f).[1]

In testing the sufficiency of the evidence from which a jury could find guilt beyond a reasonable doubt, the rule is well established that the view most favorable to the Government shall be taken. *United States* v. *Leach*, 427 F.2d 1107, 1110 (1st Cir. 1970).

Congressional history indicates that, to stem traffic in dangerous weapons, Congress passed the Omnibus Crime Control and Safe Streets Act, P.L. 90-351, in June, 1968, which amended the criminal provisions as to firearms, Title 18, U.S.C. § 921, *et seq.* The provisions of Public

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[1] Section 5845(f), Title 26, in relevant part provides:

"The term 'destructive device' means (1) any explosive, incendiary, • • • (A) bomb, (B) grenade, • • • (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, • • • (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined at subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon; • • •."

Law 90-351 were not satisfactory and in October, 1968, Congress passed the Gun Control Act, P.L. 90-618, further amending Title 18, U.S.C., and revising the National Firearms Act, 26 U.S.C. § 5801, *et seq.* "Destructive Devices" were included under "firearms" for the first time in the Crime Control Act, P.L. 90-351, and, somewhat redefined, were included in the provisions of both Title 26, U.S.C. § 5845 and Title 18, U.S.C. § 921.[2] The legislative history of Public Law 90-351 refers to highly destructive devices, pages 2167 and 2199, legislative history footnote 2. However, destructive devices are not referred to in the legislative history of P.L. 90-618 as highly dangerous or destructive.[3]

It is also to be noted that neither "highly" nor any other modification of "destructive device" is used in the legislation defining destructive device in either Section 5845(f) of Title 26 or Section 921(a)(4) of Title 18.

It is the Government's contention that the devices in the case at bench are "explosive bombs" and the Court instructed the jury that was the issue for its determination.

In *United States* v. *Posnjak,* 457 F.2d 1110, 1116, (2nd Cir. 1972), the Court held that Section 5845(f)(1) applied to only military ordnance or gangster type weapons, observing that Congress was concerned in the National Firearms Act with weapons which were the cause "* * * of increasing violent crime and which had no lawful uses and the intent of the user of these weapons was irrelevant as they were so prone to abuse that they were considered per se dangerous and unnecessary for legitimate pursuits."

[2] Volume 2, U.S. Code Cong. and Adm. News, 90th Congress, 2nd session, 1968, p. 2112.

[3] Volume 3, U.S. Code Cong. and Adm. News, 90th Congress, 2nd sesison, pp. 4412 to 4435. The House bill was passed in lieu of the Senate bill.

In the case at bench the Court instructed the jury that they were not to consider the intent of the defendants as to the intended use of the devices involved, in determining the issue of whether they were dangerous within the terms of the statute.

This Court, in *United States* v. *Curtis,* 520 F.2d 1300 (1975), adopted a broader interpretation of the statute than that of the Court in *Posnjak, supra.* Two devices were involved in the Curtis case. The one held to be a destructive device was described as "consisting of approximately eight to ten sticks of dynamite bound together and with a black box bound to them."

The conviction of the defendants of possession of the above described unregistered firearms was affirmed.

The Court, after quoting the pertinent portions of Section 5845(f), which defines "destructive device," discusses cases involving the issue and then says:

> "The statutory purpose would be ill-served by an interpretation which excluded from coverage 'home-made' bombs have no lawful use simply because one of the components was dynamite, a material not in itself regulated as a firearm. Thus, while gasoline, bottles and rags all may be legally possessed, their combination into the type of ho e-made incendiary bomb commonly known as a Molotov cocktail creates a destructive device." [Citations omitted.] p. 1304.

In the case of *United States* v. *Ross,* 458 F.2d 1144 (5th Cir. 1972), a molotov cocktail,[4] a home-made device, was held to be a "destructive device" under Section 5845(f).

The Ninth Circuit, in *United States* v. *Peterson,* 475 F.2d

[4] A molotov cocktail is defined in Webster's Third New International Dictionary as "a crude hand grenade made of a bottle filled with flammable liquid (as gasoline) and fitted with a wick or saturated rag taped to the bottom and ignited at the moment of hurling."

806, 810 (1972), in affirming a defendant's conviction of violation of the Firearm's Act, stated:

> "We have concluded from a perusal of the legislative history of the act that Congress * * * intended to foster law and order among the public by the proscription of original and converted military type weapons and, also, the do-it-yourself type of similar devices and weapons of crime, violence and destruction."

The Court was there concerned with a home-made incendiary device, consisting of a casing 3 to 4 inches long filled with fuel material containing black powder and likened by the Court to a molotov cocktail. See also *United States* v. *Morningstar,* 456 F.2d 278, 280-281 (4th Cir. 1972); and *United States* v. *Oba,* 448 F.2d 892 (9th Cir. 1971).

We conclude that there was sufficient evidence to support a jury finding that the home-made devices in this case are destructive devices having no legitimate social purpose and fall within the provisions of Section 5845(f) regardless of their intended purpose.

Is Section 5845(f) unconstitutionally vague.

The need for adequate warning by the terms of Title 26, U.S.C. § 5845(f), that the devices in question fall within the provisions of that statute, is well established. The statute would be void for vagueness if it does not delineate the conduct it prohibits.

This Court, in *Goguen* v. *Smith,* 471 F.2d 88, 95 (1st Cir. 1972), in holding "treats contemptuously," referring to treatment of the flag of the United States in public, to be too vague, stated that among the well established principles upon which the void for vagueness doctrine is predicated is one that no person shall be held criminally responsible for conduct which he could not reasonably understand to be

proscribed. That case also holds that criminal statutes should be definite enough to obviate arbitrary enforcement.

The Supreme Court in *Jordan* v. *De George,* 341 U.S. 223, 231-232 (1951), said, with respect to vagueness:

> "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

The Court there held the phrase "crime involving moral turpitude" did not lack sufficient definite standards.

In *United States* v. *Harriss,* 347 U.S. 612 (1954), the Supreme Court says:

> "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." p. 617.

In considering the question of whether the statutory definition of "destructive device" is unconstitutionally vague, the Court, in *United States* v. *Morningstar,* 456 F.2d 278 (4th Cir. 1972), held that there was no merit to that argument, stating:

> "Nor do we find merit in Morningstar's plea that the Gun Control Act of 1968 is too vague to satisfy the requirements of due process. Questions about the Act's definitions arise only when resort is made to legislative history for the purpose of limiting the accepted meaning of simple and well known words. On its face, the definition of a destructive device gives fair notice to a person of ordinary intelligence that it includes any combination of parts intended to be used as a bomb or weapon and from which a bomb or weapon can be readily assembled. See United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954)." p. 281.

The Court of Appeals vacated the order of the District Court dismissing the Indictment, which charged the appellee with possession of a destructive device, and remanded

the case for further proceedings, ruling that four sticks of black powder pellet explosive fastened together with electrical tape and several unattached blasting caps could constitute a "destructive device" as a combination of parts intended for use as a bomb and from which a bomb could be readily assembled.

The Fifth Circuit considered the vagueness issue as to "destructive devices" defined in Section 5845(f), in *United States* v. *Ross, supra,* 458 F.2d 1144 (1972), holding:

> "With reference to a Molotov cocktail, the part of the definition of 'destructive device' that refers to '(B) grenade * * * or (F) similar device' is not so vague as to be outside the constitutional requirements that a person of reasonable intelligence be forewarned what is prohibited. [Citations omitted.] Section 5845(f) itself contains the crucial limitation that a destructive device does not include any device not designed or redesigned for use as a weapon. A Molotov cocktail has no use other than as a weapon, and a person may be charged with knowledge of its similarity to a grenade." p. 1145.

There is no evidence in the case at bench to, in any way, indicate that the devices here had any use in support of a social value.

We conclude that the defendants dealing in the devices here involved were well aware of their destructive propensities and that these devices had no legitimate social purpose. Section 5845(f)(1) provides adequate notice that the devices would be included within the term "explosive, * * * (A) bomb, * * * or (F) similar device," and a person of ordinary intelligence would be so aware in the circumstances of this case.

Jury Instructions

At the bench conference following the Court's instructions to the jury, appellants' counsel objected to the failure to give their instruction No. 18 which instructs that the devices "* * * must be explosive bombs or be similar to an explosive bomb" and must be highly destructive devices.

The Court did instruct the jury that it had to determine whether the devices were explosive bombs, stating: "Thus, unless you find beyond a reasonable doubt that the devices in question are explosive bombs in and of themselves, you must find each defendant not guilty of the charges in this particular case." The Court was not required to instruct the jury that the devices must be highly destructive to be destructive devices within the statute.

Counsel at the bench also requested the Court to instruct the jury that "just because it is an explosive it is not an explosive device." After full consideration of the instructions given by the Court relating to "explosive", "explosion" and explosive device, we conclude the jury was adequately instructed on appellants' theory of their defense and that there was no reversible error in not complying with appellants' request.

Appellants, for the first time on appeal, cite as error the Court's failure to define "bomb." We conclude that not giving such an instruction is not clearly erroneous when all of the Court's instructions as a whole, are considered.

The convictions are affirmed.

The judgments are ordered corrected to set forth the Code sections, the violations of which the appellants were convicted as follows:

> The judgment of conviction of defendant Alex Markley is corrected by striking "Sections 1561(d), 1561(e)" and substituting in the place and stead thereof, "Sections 5861(d), 5861(e)," the latter two sections being

those of which the defendant Markley was indicted and convicted.

The judgment of conviction of defendant Antonio Suares is corrected by striking "Sections 1561(d), 1561(e)" and substituting in the place and stead thereof, "Sections 5861(d), 5861(e)," the latter two sections being those of which the defendant Suares was indicted and convicted.

The judgments as so corrected shall be in full force and effect.

The judgments as corrected are affirmed.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

AMENDMENT V, United States Constitution

No person shall be held to answer for a captial, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U.S.C. § 5812.

§ 5812. Transfers

(a) Application.—A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; and (6) the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer,

receipt, or possession of the firearm would place the transferee in violation of law.

(b) Transfer of possession.—The transferee of a firearm shall not take possession of the firearm unless the Secretary has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

26 U.S.C. § 5845. Definitions.

For the purpose of this chapter—

(a) Firearm.—The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon. . . .

(f) Destructive device.—The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily

converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes. . . .

26 U.S.C. § 5861. Prohibited Acts.

It shall be unlawful for any person— . . .

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

(e) to transfer a firearm in violation of the provisions of this chapter; . . .

18 U.S.C. § 2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

LEGISLATIVE REPORTS.

CALENDAR NO. 1080

90TH CONGRESS
2d Session

SENATE

REPORT
No. 1097

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1967

APRIL 29, 1968.—Ordered to be printed

MR. MCCLELLAN, from the Committee on the Judiciary,

REPORT

Submitted the following

together with

MINORITY, INDIVIDUAL, AND ADDITIONAL VIEWS

[To accompany S. 917]

The Committee on the Judiciary, to which was referred the bill (S. 917) to assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

AMENDMENT

Strike out all after the enacting clause and insert in lieu thereof the following: (p. 1)

"Chapter 41.—FIREARMS

"Sec.
"921. Definitions.
"922 Unlawful acts.
"923. Licensing.
"924. Penalties.
"925. Exceptions: Relief from disabilities.
"926. Rules and Regulations.
"927. Effect on State law.
"928. Separability clause.

"§921. Definitions

"(a) As used in this chapter—

"(4) The term 'destructive device' means any explosive, incendiary, or poison gas bomb, grenade, mine, rocket, missile, or similar device; and includes any type of weapon which will or is designed to or may readily be converted to expel a projectile by the action of any explosive and having any barrel with a bore of one-half inch or more in diameter. (p. 20-21)

Highly destructive weapons

The title would extend the coverage of Federal law specifically to include highly destructive devices, such as explosive or incendiary bombs, grenades, mines, and so forth, and would establish strict controls for interstate and foreign commerce in such devices, and large-caliber military-type weapons, such as bazookas, mortars, and anti-tank guns.

The record reflects a consensus that these highly destructive devices should be subjected to strict Federal regulations. (p. 80)

CALENDAR NO. 1486

90TH CONGRESS *2d Session* | SENATE | REPORT No. 1501

GUN CONTROL ACT OF 1968

SEPTEMBER 6 (legislative day, SEPTEMBER 5), 1968—
Ordered to be printed

MR. DODD, from the Committee on the Judiciary, submitted the following

REPORT
together with
INDIVIDUAL VIEWS
[To accompany S. 3633]

The Committee on the Judiciary, to which was referred the bill (S. 3633) to amend title 18 of the United States Code, to provide Federal controls over interstate and foreign commerce in firearms, designed to make it feasible for the States to control more effectively the firearms traffic within their own borders under their own police power, having considered the same, reports favorably thereon, with amendments and recommends that the bill, as amended, do pass.

AMENDMENTS

1. On page 1, between lines 4 and 5, insert the following:

TITLE 1—STATE FIREARMS CONTROL ASSISTANCE.

2. On page 1, line 0, strike out "Sec. 2." and insert in lieu therof: "Sec. 101". (p. 1)

7. On page 5, line 20, strike out all through line 6 on page 6, and insert in lieu thereof the following:

(4) The term "destructive device" means (1) any explosive, incendiary or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one half inch in diameter, except a shotgun or shotgun shell which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; and device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned or given by the Secretary of the Army pursuant to the provisions of sections 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary of the Treasury or his delegate finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes. (p. 2)

. . . . . .

63. At the end of title I add a new title II as follows:

TITLE II — MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS

Sec. 201. Chapter 53 of the Internal Revenue Code of 1954 is amended to read as follows:

"CHAPTER 53 — MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS (p. 8)

. . . . . .

"Sec. 5745. DEFINITIONS.

"For the purposes of this chapter— (p. 13)

. . . . . .

"(f) The term 'destructive device' means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of sections 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary of the

Treasury or his delegate finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes. (p. 14)

. . . . . .

Purpose of the Amendments (p. 20)

. . . . . .

A revised definition of "destructive device" was included in title I of the bill, incorporating technical changes and making consistent the definition of the term in both titles I and II. (p. 20)

. . . . . .

Scope of Coverage

TITLE I — STATE FIREARMS CONTROL ASSISTANCE (p. 23)

. . . . . .

Highly destructive weapons

The title would extend the coverage of Federal law specifically to include highly destructive devices, such as explosive or incendiary bombs, grenades, mines, etc., and would establish strict controls for interstate and foreign commerce in such devices and large-caliber military-type weapons, such as bazookas, mortars, and anti-tank guns.

The record reflects a consensus that these highly destructive devices should be subjected to strict Federal regulations. (p. 25).

CONFERENCE REPORT NO. 1956

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 17735) to amend title 18, United States Code, to provide for better control of the interstate traffic in firearms, submit the following statement

in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

The Senate struck out all of the House bill after the enacting clause and inserted a substitute amendment. The committee of conference has agreed to a substitute for both the House bill and the Senate amendment. Except for technical, clarifying, and conforming changes, the following statement explains the differences between the House bill and the substitute agreed to in conference. (Vol. 3 U. S. Code Cong. & Adm. News 90th Cong. 2d Sess. 1968, p. 4434)

DEFINITIONS

Destructive devices.—The House bill defined the term "destructive device" to mean any explosive, incendiary, or poison gas bomb, grenade, mine, rocket, missile or similar device and to include any type of weapon which will or is designed to or may be readily converted to expel a projectile by the action of any explosive and which has any barrel with a bore of one-half inch or more in diameter. It excluded from such term the following: Any device which is not used, or which is not intended to be used, as a weapon, any shotgun other than a short-barreled shotgun, any nonautomatic rifle (other than a short-barreled rifle) generally recognized or particularly suitable for hunting big game, and certain surplus obsolete ordnance. Also excluded is any other device which the Secretary of the Treasury finds is not likely to be used as a weapon.

The Senate amendment is essentially the same as the House bill, except that (1) the only rockets included in the definition are those having a propellant charge of more than 4 ounces and the only missiles included are missiles having an explosive or incendiary charge of more than one-quarter ounce, but parts from which a destructive device may be readily assembled are included; and (2) excluded from the definition are shotguns and shotgun shells found by the Secretary to be suitable for sporting purposes, and any device which the Secretary finds is an antique or a rifle which the owner intends to use solely for sporting purposes. Further, the Senate amendment does not specifically exclude the nonautomatic rifles excluded by the House bill.

The conference substitute adopts the Senate amendment. *Ibid*, p. 4427.

AMENDMENTS TO INTERNAL REVENUE CODE OF 1954 (NATIONAL FIREARMS ACT)

The Senate amendment contained a provision, not in the House bill, which amended the National Firearms Act in the following significant respects: The scope of that Act was extended to cover additional weapons, most notably destructive devices; the registration requirements were extended to all weapons covered by the Act; any element of self-incrimination was eliminated; and increased penalties were provided for violations of the Act. (Ibid., p. 4434)

Extension of the scope of the National Firearms Act.—The present National Firearms Act covers gangster-type weapons such as machineguns, sawed-off shotguns, short-barreled rifles, mufflers, and silencers. Under the amendment it would also cover machinegun frames and receivers, so-called "conversion kits" for turning other weapons into machineguns, and combinations of machinegun parts when in the possession of a single person. Also smooth-bore pistols and revolvers designed to fire shotguns' shells, concealable combination rifles and shotguns, and destructive devices would be included. Antique firearms and unserviceable heavy weapons would be excluded from coverage. (Ibid., p. 4434)

The conference substitute adopts the Senate proposed amendments to the National Firearms Act and to related provisions of the Internal Revenue Code of 1954.

(Ibid., p. 4435)

No. 77-1001

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALEX MARKLEY AND ANTONIO SUARES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet, App. A) is reported at 567 F. 2d 523.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1977. The petition for a writ of certiorari was filed on January 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the definition in the National Firearms Act, 26 U.S.C. 5845(f), of a "destructive" device includes a homemade bomb or similar devices.

2. Whether the court of appeals properly considered evidence of certain tests in evaluating whether petitioners' homemade devices were "destructive device[s]."

3. Whether 26 U.S.C. 5845(f), as applied to homemade devices containing black powder and having explosive potential, is unconstitutionally vague.

STATUTES INVOLVED

26 U.S.C. 5845(f) provides in pertinent part:

> (f) *Destructive device.* The term 'destructive device' means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellent charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; * * * (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined [above] and from which a destructive device may be readily assembled. The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon * * *.

26 U.S.C. 5861 provides in pertinent part:

> It shall be unlawful for any person—
>
> * * * * *
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration, and Transfer Record; or
>
> (e) to transfer a firearm in violation of the provisions of this chapter; * * *.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner Markley was convicted of one count of possessing and four counts of transferring an unregistered destructive device, and petitioner Suares was convicted of three counts of possessing and three counts of transferring an unregistered destructive device, in violation of 26 U.S.C. 5812 and 5861(d) and (e). Petitioner Markley was sentenced to 18 months' imprisonment, and petitioner Suares was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. A).

1. The facts are set out in the opinion of the court of appeals (Pet. App. 2-5). In November 1975, petitioner Markley, a union organizer, asked undercover Agent O'Reilly to blow up two trucks belonging to Martin Brothers Trucking Company. Petitioner Markley gave Agent O'Reilly a bomb but, after testing it, O'Reilly told Markley that the device was inadequate (Pet. App. 4; R. 100). Later in the month O'Reilly met with both petitioners, and Markley told O'Reilly that he still wanted to blow up the Martin Brothers' trucks (R. 120). On December 5, 1975, O'Reilly telephoned petitioner Markley and requested three devices similar to the one Markley had furnished earlier, but this time the devices were to be taped with electrician's tape and were to have different lengths of fuse attached (Pet. App. 5; R. 125-126). Three days later petitioner Suares delivered the three assembled devices to O'Reilly for $75 (Pet. App. 5).

2. At trial petitioners stipulated that they had possessed and transferred the devices (Pet. App. 2; R. 620) and defended only on the ground that the devices were not "destructive devices" within the meaning of 26 U.S.C.

5845(f).[1] The devices consisted of paper tubes approximately 4 1/2 inches in length and 1 1/2 inches in diameter; they contained between 3 1/2 and 4 1/2 ounces of commercially manufactured black powder with a small amount of toilet tissue as a filler. The ends were sealed with paraffin wax over cardboard discs, and one end contained a fuse (Pet. App. 2-3). The government's expert witness, Ralph Cooper, Explosive Enforcement Officer of the Bureau of Alcohol, Tobacco, and Firearms, conducted tests on replicas, or exemplars, of the devices in November 1976 (Pet. App. 3); petitioners' expert did the same (Pet. App. 3).

The results of all tests were similar. One exemplar, set out in the open, produced an eleven cubic-foot fireball when detonated (Pet. App. 3), and a second, detonated in a trash can, sent the lid 25 to 30 feet in the air (R. 352). An exemplar ignited in a closed cab of a pickup truck blew the windshield out of the vehicle and threw it 6 to 8 feet (Pet. App. 3-4; R. 453). An exemplar in a filler pipe attached to an empty gas tank produced an explosion that burst the filler pipe and caused the gas tank to bulge (Pet. App. 4; R. 455-456). Cooper concluded that the devices were explosive bombs that had no use except to destroy property or injure persons (Pet. App. 4; R. 465, 516).

ARGUMENT

1. Petitioners contend that the definition of "destructive device" in the National Firearms Act, 82 Stat. 1231, 26 U.S.C. 5845(f), includes only military ordnance, gangster-type weapons, or similar "highly" destructive

[1]A count charging conspiracy to attempt maliciously to damage or destroy vehicles used in interstate commerce by means of an explosive was dismissed by the trial court at the close of the government's case.

devices (Pet. 10-15). But petitioners' argument ignores the plain meaning of the statutory definition, which speaks of any explosive "bomb[s]" or similar device[s]." There was evidence that the devices here were bombs (R. 465, 516); in any event, the statute's proscription of "similar device[s]" necessarily goes beyond military ordnance. See *United States* v. *Peterson*, 475 F. 2d 806, 811 (C.A. 9), certiorari denied, 414 U.S. 846; *United States* v. *Oba*, 448 F. 2d 892 (C.A. 9), certiorari denied, 405 U.S. 935; cf. *United States* v. *Powell*, 423 U.S. 87, 91.

a. In support of their argument, petitioners rely primarily upon the decision of the Second Circuit in *United States* v. *Posnjak*, 457 F. 2d 1110, which they claim restricts the Act's reach to military or gangster-type weapons and thus conflicts with the decision below. *Posnjak* held only that ordinary commercial blasting dynamite does not come within 26 U.S.C. 5845(f)(1), since it is not an explosive of the kinds specifically enumerated, nor is it a "similar device" merely because it is a product (like "innumerable other articles") having "some explosive power" (457 F. 2d at 1116).[2] Similarly, because commercial dynamite did not come within subparagraph (1), it could not be brought within subparagraph (3) ("any combination of parts either designed or intended for use in converting any device into a destructive device as defined" in subparagraph (1)) merely because the defendants intended to use the dynamite unlawfully.

This case is plainly distinguishable from *Posnjak*, for petitioners' devices were not ordinary commercial explosives. They were designed for use as weapons, and they were homemade, containing black powder inside

[2]Furthermore, as *Posnjak* noted, 26 U.S.C. 5845(f) specifically excludes any device which is not designed for "use as a weapon."

paper tubes, with fuses attached (Pet. App. 2-3). The devices produced fireballs in the open and caused damage when exploded within a confined space (Pet. App. 3-4). As such, they clearly come within subparagraphs (1) and (3) of Section 5845(f), since they are bombs or at least devices "similar" to bombs and "designed" as such.

Furthermore, later cases in the Second Circuit demonstrate that petitioners' reliance upon *Posnjak* is misplaced. In *United States* v. *Cruz,* 492 F. 2d 217, 219, certiorari denied, 417 U.S. 935, the court of appeals stated:

> We recognized in *United States* v. *Posnjak, supra*, that the legislative history of the Firearms Act indicates that it requires registration of objectively destructive devices, devices inherently prone to abuse and for which there are no legitimate industrial uses.

The court of appeals there found that a Molotov cocktail was within the statutory definition, for it has "no use besides destruction" (492 F. 2d at 219). See also *United States* v. *Bubar*, 567 F. 2d 192, certiorari denied, October 3, 1977 (No. 77-5304) (homemade device consisting of dynamite, blasting caps, fuses, and timers was within statutory definition for it had no lawful industrial use). Clearly then, the instant devices are within Section 5845(f), for they lack any legitimate industrial use and were plainly designed for use as weapons. There is no basis for supposing that the Second Circuit would hold otherwise.

b. Petitioners also contend that portions of the legislative history of Section 5845(f) refer to application of the statute to "highly" destructive devices, and they argue that the devices here are "relatively harmless" and

therefore not within the intended reach of the statute (Pet. 9, 12-15). But the legislative history cited by petitioners casts no doubt on their conviction. While it is true that the legislative materials contain the phrase "highly destructive device," there is no reason to suppose that the potentially destructive bombs involved in this case were not within the expected ambit of the statutory prohibition. Indeed, the statute, as well as the Senate Report upon which petitioners rely (Pet. App. 18-24), defines "destructive device" to exclude rockets having a propellent charge of four ounces or less and missiles having a charge of one-quarter ounce or less. *Id.* at 19, 20. But there is no corresponding minimum for charges in bombs, grenades or "similar devices," and the Senate must therefore be presumed to have intended none. Furthermore, the Report shows (*id.* at 21) that the Senate Committee used "highly destructive devices" generically to refer to "explosive or incendiary bombs, grenades, mines, etc." and did not distinguish between bombs of greater or lesser destructiveness. The lack of distinction is reflected in the statute, which contains no requirement that the devices be "highly" destructive. Whether petitioners' devices were "highly" destructive or only moderately or slightly so, they were within the reach of the statute. See, *e.g., United States* v. *Wilson*, 546 F. 2d 1175 (C.A. 5), certiorari dismissed, 431 U.S. 901 (homemade dynamite bomb); *United States* v. *Evans,* 526 F. 2d 701 (C.A. 5) (homemade dynamite bomb that failed to function, even when tested by the government); *United States* v. *Curtis,* 520 F. 2d 1300 (C.A. 1) (homemade dynamite bomb); *United States* v. *Cruz, supra* (Molotov cocktail); *United States* v. *Tankersley,* 492 F. 2d 962 (C.A. 7) (firecracker, fuse, paint remover in bottle).

2. Petitioners argue (Pet. 15-17) that the court of appeals, in finding the devices to be within Section 5845(f), improperly considered evidence of petitioners' "intended use" of the devices although the trial court instructed the jury that intent was not to be considered. The crux of petitioners' argument seems to be that the court of appeals, in concluding that the devices here were "destructive," improperly relied in part on tests showing what happened when the devices were detonated in a truck cab, rather than relying solely on tests conducted in the open (Pet. 16-17). The closed-area tests, according to petitioners, were of "intended use," and thus they assert that the court of appeals could not properly consider them. But the court of appeals did no more than refer to evidence of tests properly before the jury. Petitioners do not claim that the admission of the government's tests was erroneous, nor did they dispute the facts of such tests at trial (Pet. App. 4). There is no reason that the court of appeals, in considering evidence of destructiveness, was obliged to confine itself to tests conducted in the open air and to ignore evidence—properly admitted—of tests conducted in closed spaces. Even if evidence of "intended use" were improper, see *Posnjak, supra,* this evidence did not fall into that category. Plainly, in any event, this is not an issue meriting consideration by this Court.

3. Petitioners also contend that the statute as applied is void for vagueness (Pet. 18-20). But the court of appeals properly concluded that petitioners' vagueness argument is answered by *United States* v. *Morningstar,* 456 F. 2d 278, 281 (C.A. 4), certiorari denied, 409 U.S. 896:

> Nor do we find merit in Morningstar's plea that the Gun Control Act of 1968 is too vague to satisfy the requirements of due process. Questions about the Act's definitions arise only when resort is made to

> legislative history for the purpose of limiting the accepted meaning of simple and well known words. On its face, the definition of a destructive device gives fair notice to a person of ordinary intelligence that it includes any combination of parts intended to be used as a bomb or weapon and from which a bomb or weapon can be readily assembled. See *United States* v. *Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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